



INVESTIGATIVE REPORT

Lori Torres, Inspector General

OFFICE: INDIANA DEPARTMENT OF REVENUE

TITLE: CONTINGENCY FEE CONTRACT

CASE ID: 2017-11-0268

DATE: November 30, 2017

DEPARTMENT OF REVENUE CONTINGENCY FEE CONTRACT

After examination and review, Inspector General Staff Attorney Kelly Haltom reports as follows:

The purpose of this Report is to fulfill the statutory requirements of Ind. Code § 4-6-3-2.5 regarding contingency fee contracts. This statute requires the Inspector General (“IG”) to review contingency fee contracts for possible conflicts of interests and potential Code of Ethics violations. Under this statute, an agency may not enter into a contingency fee contract unless the IG has made a written determination that entering into the contract would not violate the Indiana Code of Ethics set forth in Ind. Code 4-2-6 and 42 IAC 1-5 (“Code of Ethics”) or any statute or agency rule concerning conflicts of interests.

On November 20, 2017, the Indiana Department of Revenue (“DOR”) notified the IG that it wished to enter into a contingency fee contract with Mattingly Burke Cohen & Biederman LLP, an Indianapolis based law firm (“the Firm”). The DOR’s request explains that the State will utilize the Firm to undertake the litigation of two (2) cases, specifically, *Sahara Mart, Inc. v. Indiana Department of State Revenue* and *Advanced Medical Center, P.C. v. Indiana Department of State*

Revenue (“the Cases”). The Cases are currently before the Indiana Tax Court. The State will compensate the Firm through a contingency fee in the amount of 15% of any amount recovered. The Firm will also charge the State a reduced hourly rate of \$225 an hour, as opposed to their normal hourly rate of \$365 an hour.

Pursuant to Ind. Code § 4-6-3-2.5(b), the DOR is required to make a written determination before entering into the contract that the contingency fee representation is cost effective and in the public interest. The DOR must consider five factors when making this determination as outlined by Ind. Code § 4-6-3-2.5(c). The DOR made such a determination and considered all of the factors outlined in the statute.

The DOR’s determination explains that it is not cost-effective or in the public’s interest for the DOR to undertake the litigation of the Cases based upon the substantial time and initiative required to effectively litigate the matters and the lack of resources available to the State to do so.

The DOR’s determination provides that the Cases each involve tax assessments issued by the DOR on the basis of the best information available (BIA) because both taxpayers in the Cases failed to keep and maintain records as required by Indiana law. The DOR’s determination notes that the taxpayers in the Cases will seek to develop alternative proofs to the DOR’s assessments based on superior knowledge of their own businesses. The DOR’s determination explains that they will need to invest considerable energy in discovery and analysis of the taxpayers’ claims, to both critique the taxpayers’ analyses and to develop competing narratives.

The DOR’s determination notes that they need experienced and skilled litigators with the time and initiative to aggressively litigate the Cases to a successful conclusion. In particular, the DOR requires litigators with a particular skill in the discovery process. The DOR’s determination explains that the Firm is comprised of such situated litigators who have well-established skills and

experience in discovery disputes.

Furthermore, Ind. Code § 4-6-3-2.5(d) requires the DOR to request proposals from private attorneys wishing to provide services on a contingency fee basis, unless the agency, in this case the DOR, determines in writing that requesting proposals is not feasible under the circumstance. The DOR did not request proposals from private attorneys wishing to provide services on a contingency basis; however, they conducted a search of Marion County litigators before selecting the Firm. The DOR's determination explains that requesting such proposals was not feasible under the circumstances due to the unique needs of the DOR for purposes of effectively litigating the Cases and the discovery disputes that they contain.

After careful examination and review, the IG has determined that the contract will not violate the Code of Ethics or any statute or agency rule concerning conflicts of interests. According to the DOR, no employee of the DOR has any ownership interest in the Firm, nor do any of the DOR personnel involved in any of the contracting decisions work for or have any relatives working at the Firm. Because of that, it also does not appear that any DOR employee is contracting with or will be supervising the work of a business entity in which a relative is a partner, executive officer or sole proprietor.

Based on the information provided, we find that entering into the contract will not violate the Code of Ethics or any statute or agency rule concerning conflicts of interest. This Report is issued in compliance with the above noted statutory requirements.

Dated November 29, 2017.

APPROVED BY:



Lori Torres, Inspector General